Supreme Court, U.S.
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Record No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CHAMPION INTERNATIONAL CORPORATION,
Petitioner,

v.

RACHEL T. SMITH, AS EXECUTRIX
FOR THE ESTATE OF ROBERT W. SMITH,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, contrary to the holdings of three other circuits, the Fourth Circuit correctly held that a conflict of interest exists when an employer administers its own benefit plan and pays benefits out of its general assets.

2. If such a legal conflict does exist, what is the appropriate standard of review for the courts to apply in reviewing such cases?

PARTIES TO THE PROCEEDING

1. Champion International Corporation, Defendant in the district court and Petitioner. Champion International Corporation has no parent company and no subsidiaries which are less than wholly owned.

2. Rachel T. Smith, Executrix of the estate of Robert W. Smith and Respondent. Robert Smith was the Plaintiff in the district court.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Champion International Corporation respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The final Opinion and Order of the United States District Court for the Western District of Virginia is unreported and is reprinted in the Appendix ("App.") to this petition at 1a-14a. The Opinion of the United States Court of Appeals for the Fourth Circuit reversing the district court is unreported and is reprinted at App. 15a-21a.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on September 25, 1997. The court of appeals denied a timely Petition for Rehearing and Suggestion for Rehearing *En Banc* on October 23, 1997. (App. 22a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*, ("ERISA") are set forth in the Appendix to this petition. (App. 24a-27a).

STATEMENT OF THE CASE

Petitioner Champion International Corporation ("Champion") is a large paper company with operations throughout the United States. Plaintiff Robert W. Smith ("Smith"), a former employee of Champion, qualified for disability benefits under Champion's Long Term Disability Plan for Salaried Employees ("Plan") on February 21, 1984. Smith continued to receive his disability benefits for over nine years until July 1, 1993 when they were terminated by Champion.[1] Champion terminated these benefits after it completed an investigation and found substantial evidence that Smith had defrauded Champion.

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[1] Champion's Plan provides that an employee receives long-term disability benefits under the Plan for as long as the employee is totally disabled as defined by the Plan. After an employee receives benefits for 24 months, the Plan defines "total disability" as "the inability to engage in any occupation or business for wage or profit for which he is or may become reasonably qualified by training, education, or experience."

Smith filed suit under ERISA[2] on August 22, 1994 seeking reinstatement of those benefits. On cross-motions for summary judgment, the district court reviewed the Plan and, on May 2, 1995, held that the termination of Smith's benefits should be reviewed under the deferential abuse of discretion standard of review. (R. 47-49). The court based its decision on the broad grant of discretion in Champion's Plan which provides:

> The Committee shall have the power and authority in its sole, absolute and uncontrolled discretion to control and manage the operation and administration of the Plan and shall have all powers necessary to accomplish these purposes. The responsibility and authority of the Committee shall include but shall not be limited to the following: (a) determining all questions relating to the eligibility of Employees to participate; . . . (d) interpreting the provisions of the Plan including the publication of rules for the regulation of the Plan as in its sole, absolute and uncontrolled discretion are deemed necessary or advisable and which are not inconsistent with the express terms hereof or ERISA.

(R. 47, 137).[3] The district court specifically rejected Smith's argument that because the Plan is unfunded and administered by Champion employees, the Plan's decision should be reviewed *de novo*. (R. 48-49).

Applying the abuse of discretion standard, the district court found, in its first of two opinions, that Champion had committed procedural and substantive errors in terminating Smith's benefits and remanded Smith's claim back to the Plan. (R. 49-61). The district court concluded that remand to the plan was particularly

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[2] The jurisdiction of the district court was based on 29 U.S.C. § 1132(a)(1)(B), (f), (g).

[3] Citations to "R." refer to the Joint Appendix filed with the court of appeals.

appropriate in this case because discovery had "developed a plethora of new evidence." (R. 61-62).

On remand from the district court's first opinion, Smith was allowed to submit any evidence he desired Champion to consider in reviewing his claim and was allowed to review everything in the administrative record. (R. 304, 317-18, 323-24). When the record was complete, Champion forwarded it to Travelers Insurance Company for review and an initial determination. (R. 373-74). On November 6, 1995, Travelers issued its determination that again concluded that Smith was not eligible for benefits. (R. 389-93). The record contained the following uncontradicted evidence which supported that determination.

- Smith falsely represented on a Personal Profile Evaluation Form[4] dated December 5, 1992 that he did not travel, did not participate in social or community activities, did not do housework, and needed help with personal grooming. (R. 179-81).

- Dr. Merritt Foster, a psychiatrist obtained by Champion, concluded in September of 1996:

> With the inability to establish the diagnosis of an incapacitating mental illness, and with the overwhelming evidence of Malingering and deceit, it is my opinion within a reasonable degree of medical certainty, the position that Mr. Robert Smith is and has been, totally and permanently disabled, for any employment since February 1986 is untenable. Any inability to be gainfully employed on his part, therefore, is a matter of volition and not the result of an incapacitating emotional or mental illness.

(R. 346-47).

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[4] The Personal Evaluation Form was a questionnaire form used to determine whether an individual continued to be eligible for long-term disability benefits.

In contrast to the representations on the Personal Profile Evaluation Form, the record shows that:

- In the fall of 1992, Smith embarked on a month-long journey to California, Japan, China, Nepal, and Thailand. (R. 430-37, 838-39).

- From 1986 to 1993, he participated in a number of community activities, including serving as Chairman of the Longwood College Continuing Education Advisory Board, the Private Industrial Council, and the Halifax Vocational Foundation. (R. 438-554).

- Affidavits from two South Boston citizens who served with Smith on community boards during the period he was on disability stated that Smith participated actively and creatively in these organizations. (R. 772-77).

- Surveillance videotapes showed Smith operating a motor vehicle, attending meetings of the above community organizations, purchasing products, performing bank transactions, having two conversations in which he was laughing and animated, and throwing brush and limbs on a bonfire. (R. 187-99).

- Newspaper articles showed that Smith, while he was receiving disability benefits, vigorously campaigned for reelection to South Boston City Council. (R. 420-29). During the campaign, he prepared his own budget figures and visited citizens door-to-door. *Id.*

As provided for in the Plan, Smith appealed the determination by Travelers to a Claims Review Committee, a committee composed of Champion employees. After reviewing the entire record, the Claims Review Committee affirmed the determination that Smith did not satisfy the eligibility provision of its long-term disability plan. (R. 413-15).

After the Plan's decision denying benefits, Smith's case was reinstated on the district court's docket. On November 4, 1996, that court granted Champion's motion for summary judgment and dismissed all of Smith's claims. (App. 1a-13a). In its detailed opinion, the district court again considered and rejected Smith's argument that the standard of review should be less deferential because Champion administered its own unfunded plan. (App. 6a-8a). The district court then proceeded to review the Plan's decision pursuant to the abuse of discretion standard. (App. 8a-12a).

From the facts in the record, the district court found that Smith misrepresented his abilities and activities when he signed the Personal Profile Evaluation Form on December 5, 1992 and returned the questionnaire to the administrator of Champion's plan. (App. 9a). Turning to Smith's arguments, the district court noted that Smith did not dispute or explain why he falsely answered material questions on the Personal Profile Evaluation Form. (App. 10a). The district court rejected Smith's contention that the medical evidence, including multiple letters from his treating physician, required Champion to continue his benefits. Citing Smith's failure to reveal his 1992 trip to Southeast Asia and China to his treating physician and his failure to rebut evidence that Smith attempted to deceive his doctors so that they would provide him a favorable medical opinion, the district court held "there was ample evidence in the record to support Champion's decision to favor Dr. Foster's opinion over other medical testimony." (App. 12a). Consequently, the district court concluded that Champion's decision to deny Smith's disability claim was amply supported by the record and granted Champion's motion for summary judgment. (App. 12a-13a).

On appeal, Smith contended that because Champion administered its own unfunded plan, it had a conflict of interest. Smith further argued that because the district court found no conflict of interest, it applied the wrong standard of review when examining the plan's decision to deny benefits. Addressing this argument, the

court of appeals cited *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and correctly stated that: "If the plan states that the administrator is empowered to construe uncertain terms or that the administrator's eligibility determinations are to be given deference, then the abuse of discretion standard is appropriate." (App. 18a). The court then quoted *Firestone*'s instruction that: "When a conflict of interest exists, the district court must weigh the conflict 'as a factor in finding whether the fiduciary or plan administrator abused its discretion.'" (App. 18a-19a). Nevertheless, the Fourth Circuit found that the abuse of discretion standard does not apply when a fiduciary or administrator is operating under a conflict of interest. (App. 19a). The court held that in that situation a new standard of review applied - "a modified abuse of discretion standard." *Id.*

Three factors influenced the Fourth Circuit's decision that Champion's plan operated under a conflict of interest. "One, Champion directly appoints and compensates the members of its Committee and the Plan Supervisor, and each appointee is a Champion employee. Two, Champion administers the plan itself; . ... Third, the plan is not fully funded." *Id.* The Fourth Circuit found that these three factors alone constituted a conflict of interest and, therefore, deprived the Plan of the abuse of discretion standard. (App. 19a-20a). Under its new more rigorous standard, the Fourth Circuit reviewed the district court's decision and ordered the reinstatement of Smith's benefits. (App. 20a-21a).

Champion's petition for rehearing and suggestion for rehearing *en banc* was denied. (App. 22a-23a). Champion now seeks review in this Court.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Directly Conflicts With the Decisions of Other Courts Of Appeals and Raises Critical Questions Concerning Judicial Review of Plan Decisions Involving Employee Benefits

When Congress passed ERISA, it sought to obtain national uniformity in the administration of employee benefit plans. It also sought to minimize litigation and encourage prompt resolution of disputes over benefits. In an effort to accommodate the goals of ERISA, this Court in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), promulgated the rule that when a plan gives administrators discretionary authority, then the courts should not reverse these decisions unless the plans have abused their discretion. Since this Court's *Firestone* decision in 1989, the lower courts have employed various standards of review. As a result, benefit litigation is clogging the lower courts, inconsistent standards of review are being utilized, and different results are occurring under national plans in different courts in our country. For example, Champion's disability plan, which is national in scope, would receive different reviews in the Seventh and Fourth Circuits even though the same plan is being uniformly interpreted by the same administrators throughout the country.

In sum, the present system is not working. Only by this Court getting involved and reconciling the conflicting interpretations of its *Firestone* decision, can the current confusion be eliminated. The question presented by this case is a recurring one. It will not go away. Its resolution is important to all benefit plan administrators, employees, and employers. In order to resolve the current conflict and to reaffirm that judicial deference is owed to plan interpretations that are reasonable and supported by the record, this Court's review is warranted.

In its seminal decision in *Firestone*, issued almost nine years ago, the Court set out the method for determining the standard of review in an ERISA denial of benefits case. Stating its holding, the Court wrote:

> Consistent with established principles of trust law, we hold that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

Firestone, 489 U.S. at 115. Two sentences later, the Court added in dicta a statement that the lower courts have been struggling to interpret ever since. That statement read:

> ***Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.' Restatement (Second) of Trusts § 187, Comment d (1959).***

Id. (Emphasis added).

As the Fourth Circuit did in this case, the lower courts are using this statement to abolish the deferential review the common-law of trusts and this Court's decision in *Firestone* mandate. Champion's plan, like thousands of welfare benefit plans in the United States and as specifically provided for in ERISA, is administered by Champion employees and funded from Champion's general assets. Relying on the sentence from the *Firestone* decision quoted above, the Fourth Circuit found this structure to be a conflict of interest and, thus, applied a less deferential standard of review it termed a

"modified abuse of discretion standard." The result was that the denial of benefits that withstood intense scrutiny by the district court under the abuse of discretion standard was found invalid.

The Fourth Circuit's decision is in direct conflict with decisions from other court of appeals, ignores the clear intent of ERISA, and emasculates this Court's ruling in *Firestone*. Additionally, the struggle of the lower courts to identify which plan structures constitute a conflict of interest and how to account for a conflict, when a court believes it has found one, affects millions of ERISA plans nationwide.[5]

In direct contrast with the conclusion reached by the Fourth Circuit in this case, the Second and Seventh Circuits both have held that the decisions by an unfunded plan and administered by the employer do not constitute a conflict triggering a more rigorous standard of review. In *Chalmers v. Quaker Oats Co.*, 61 F.3d 1340 (7th Cir. 1995), the Seventh Circuit reviewed Quaker Oats' decision to deny Chalmers benefits from the company's severance program, which was a welfare benefit plan covered by ERISA. *Id.* at 1342-43. Quaker Oats administered the plan with its own employees and funded the plan from its general assets. *Id.* at 1344.

Chalmers argued that the potential conflict diminished the deference which the court should give the committee's decision. *Id.* The Seventh Circuit expressly rejected the argument. *Id.* Addressing the plan's structure, the court found that ERISA specifically authorizes employers to appoint their own officers to administer ERISA plans.

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[5] When ERISA was amended more than ten years ago, employers in this country sponsored approximately 4.5 million welfare benefit plans covering some 65 million participants. Pension & Welfare Administration, U.S. Dep't of Labor, *Employee Retirement Income Security Act 1986 Report to Congress*. Champion is unaware of data showing the number of plans in existence today or the number of funded versus unfunded plans. This figure, however, is sure to be much greater than the 1986 figure.

Id.; *see also* 29 U.S.C. § 1108(c)(3). Addressing the funding issue, the court concluded that if Congress had been concerned with this issue, it would have taken measures to prevent corporate officers from serving as plan administrators. *Chalmers*, 61 F.3d at 1344. The court also found that with revenues of $6 billion annually, "[t]he impact on a company's welfare of granting or denying benefits under a plan will not be sufficiently significant as to threaten the administrators' partiality." *Id.* Accordingly, the court reviewed the plan's decision under the arbitrary and capricious or the abuse of discretion standard. *Id.* at 1345; *see also Chojnacki v. Georgia-Pacific Corp.*, 108 F.3d 810, 815 (7th Cir. 1997) (reaffirming the *Chalmers* holding in reviewing the denial of severance benefits under a Georgia-Pacific Corporation severance plan).

The Second Circuit in *Pagan v. NYNEX Pension Plan*, 52 F.3d 438 (2d Cir. 1995) reached the same result on a similar argument by a plaintiff, but used a different analysis. Pagan claimed benefits under a provision of the NYNEX plan that provided long-term disability benefits. *Id.* at 439. Because NYNEX's plan was funded by NYNEX's current operating revenues and NYNEX administered its plan with its own employees, Pagan contended that the plan administrator's decision should not be given any deference. *Id.* at 442. The Second Circuit expressly rejected this argument and, relying on the *Firestone* decision, stated: "we review the NYNEX Committee's decision under the arbitrary and capricious standard, irrespective of whether the NYNEX Committee was operating under a possible or actual conflict of interest." *Id.* The court refused to find that the alleged conflict had any influence on NYNEX's decision because "Pagan fail[ed] to explain how such an alleged conflict affected the reasonableness of the Committee's decision." *Id.* at 443.

In addition to the direct conflict with the Seventh and Second Circuits, the Fourth Circuit's decision also conflicts with the legal analysis used by the Ninth Circuit. In that circuit, a plaintiff must

produce "material, probative evidence, ***beyond*** the mere fact of the apparent conflict, tending to show that the fiduciary's self-interest caused a breach of the administrator's fiduciary obligations to the beneficiary." *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1323 (9th Cir. 1995) (emphasis added). If the beneficiary cannot make such a showing, the Ninth Circuit applies the traditional abuse of discretion standard. In contrast, the Fourth Circuit ***automatically*** applied a more rigorous standard of review to Champion's Plan because it concluded as a matter of law that it operated under a conflict of interest. (App. 19a-20a). The Fourth Circuit, contrary to the test followed by the Second and Ninth Circuits, required no evidentiary showing by the Plaintiff that the alleged conflict caused any breach of a fiduciary duty or had any effect on the plan administrator's decision.

The approaches of the Second, Seventh, and Ninth Circuits demonstrate the complete confusion that exists among the different circuits on how to even analyze the conflict of interest issue. In the Ninth Circuit, if the employee satisfies the initial burden discussed above, the burden shifts to the plan to show that the conflict of interest did not affect the decision to deny benefits. *Atwood*, 45 F.3d at 1323. If the plan does not satisfy that burden, the court reviews the decision *de novo*. *Id.* In the Second Circuit, if a conflict of interest is alleged, a court first must consider whether a plan administrator's determination is reasonable, in light of possible competing interpretations of the plan. *Sullivan v. LTV Aerospace and Defense Co.*, 82 F.3d 1251, 1255-56 (2nd Cir. 1996). If it is, the court must decide whether the evidence shows that the administrator was in fact influenced by the alleged conflict of interest. *Id.* "If the court finds that the administrator was in fact influenced by the conflict of interest, the deference otherwise accorded the administrator's decision drops away and the court interprets the plan *de novo*." *Id.* at 1256.

These different approaches are just the beginning. The Eighth Circuit recently decided that where an insurance carrier played the dual role of the administrator and insurer of a health benefits plan, its decision automatically would be reviewed *de novo*. *Armstrong v. Aetna Life Ins. Co.*, 1997 U.S. App. LEXIS 31891 (8th Cir. Nov. 13, 1997). The court rejected Aetna's argument that the Plaintiff had to produce some evidence that the conflict affected the plan's decision. *Id.* In reaching its decision, the Eighth Circuit stated that it was "informed" by the Eleventh Circuit's decision in *Brown v. Blue Cross and Blue Shield of Alabama, Inc.*, 898 F.2d 1556 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991). *Id.* The approach the Eleventh Circuit adopted in *Brown* is that if a "substantial" conflict of interest exists, the fiduciary must show that its interpretation of plan provisions was not tainted by self-interest. *Brown* at 1566-67. The court makes no mention of any requirement that a plaintiff produce evidence that an alleged conflict influenced the plan's decision.

The Fourth Circuit in this case purported to use "a modified abuse of discretion standard." (App. 19a). Despite the label the Fourth Circuit placed on its actions, it is impossible to distinguish its review from a *de novo* review. The crux of the Fourth Circuit's decision is that the Plan, as written, is structurally deficient because it is unfunded and administered by the Company. This approach by the Fourth Circuit of mechanically finding an actual conflict would dramatically change the standard of review for thousands of employers in the country. This result cannot be reconciled with this Court's *Firestone* decision and should be reversed.

II. The Court of Appeals' Decision Reducing the Deference Given to an Unfunded Plan Administered by an Employer Conflicts With the Language and Intent of ERISA

The approach taken by the Fourth Circuit to automatically abolish the deference given to a large number of ERISA benefit

plans flatly contradicts the very language of ERISA. ERISA explicitly permits an employer or other party in interest to serve as a fiduciary notwithstanding a potential conflict of interest. *See* 29 U.S.C. § 1108(c)(3); *Varity Corp. v. Howe*, 116 S. Ct. 1065, 1071 (1996). Moreover, the statute does not vary the fiduciary's authority to make benefits decisions, or the standards limiting that authority, based on either the type of fiduciary or the funding of the plan. *See* 29 U.S.C. §§ 1101-1113. Thus, there is no justification for varying the standard of review merely because of that potential conflict.

ERISA requires that every ERISA plan designate "one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102(1). Congress specifically provided that officers, employees, agents and other representatives of a "party in interest" can be fiduciaries. 29 U.S.C. § 1108(c)(3). By so doing, Congress recognized that the potential conflict of interest in this case did not violate the conflict of interest prohibitions in the statute. ERISA therefore provides no basis for altering the standard of review where, as here, the employer fiduciary was merely performing his statutory duty of making a benefits decision.

Congress provided detailed restrictions on the powers of a fiduciary. *See, e.g.*, 29 U.S.C. §§ 1104(a), 1106, 1108(c). Congress specifically stated the duty of loyalty of a fiduciary to discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries. 29 U.S.C. § 1104(a)(1). Nevertheless, Congress explicitly allowed an employer to administer its own plan. The court of appeals decision in this case obliterates ERISA'a scheme for fiduciary duties by identifying certain fiduciaries and finding that their decisions are entitled to less judicial deference. The Fourth Circuit cannot condemn the structure of a benefit plan when Congress expressly approved its existence.

Neither did Congress draw any distinction in who can be a fiduciary of a plan based on whether the plan was funded or unfunded. All welfare benefit plans are exempt from the funding requirements of ERISA. *See* 29 U.S.C. § 1081(a)(1). The fiduciary duty requirements, however, are the same for all plans. 29 U.S.C. § 1101(a).

It is particularly important for courts to adhere to the distinctions Congress drew and refused to draw in ERISA because of the attention Congress paid to the intricacies of the legislation. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985); *Mertens v. Hewitt Associates*, 508 U.S. 248, 251 (1993). ERISA's statutory scheme permits the representative of an interested party to exercise his statutory discretion until such time as there is evidence that his "actual goal" was to promote the interests of the party who appointed him rather than those of the plan's participants and beneficiaries. *See Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 571 n.12 (1985). Where as in this case all the employer did was to decide whether claimants were entitled to benefits under the language of the plan, there is no basis for refusing to defer to that reasonable decision.

CONCLUSION

This case presents an important issue under ERISA as to which the circuits are in clear conflict. The failure of the Fourth Circuit to adhere to the clear intent of ERISA and the confusion which has been engendered among the courts, employers, and plan administrators makes review by this Court imperative. The Court should grant the Petition and reverse the judgment of the court below in order to restore order, uniformity, and reason to the law governing employee benefit plans.

Respectfully submitted,

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December 16, 1997

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APPENDIX

APPENDIX A

[Filed November 4, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

Civil Action No. 94-0069-D

ROBERT W. SMITH,
Plaintiff,

v.

CHAMPION INTERNATIONAL CORPORATION,
Defendant.

By: Jackson L. Kiser, Chief Judge
United States District Court

MEMORANDUM OPINION

Before me is defendant's second motion for summary judgment. The parties have fully briefed the issues involved and have presented oral argument. The motion is therefore ripe for disposition. For the reasons contained herein, I am of the opinion that defendant's motion should be GRANTED.

FACTUAL BACKGROUND:

Plaintiff Robert W. Smith ("Smith") challenges the termination of his long-term disability benefits by defendant Champion International Corporation ("Champion") under the Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"). Smith was an employee of Champion from 1966 until being placed on disability on or about February 16, 1984. Smith received long-term disability benefits under Champion's Long Term Disability Plan ("the Plan") continuously from February 1984 until July 1994 when Champion determined that Smith was no longer "totally disabled" as required by the Plan.

On August 22, 1994, Smith filed this action in the U.S. District Court for the Eastern District of Virginia, later transferred to the Western District on November 8, 1994, to reinstate his long-term disability benefits. After a period of discovery, the parties filed cross-motions for summary judgment. On May 2, 1995, this court resolved the motions by remanding Smith's claim to the Plan Supervisor for a redetermination of eligibility after considering all the evidence submitted by the parties.

By the end of May 1995, Champion had begun the redetermination process. Ms. Wanda Tippens collected all documents of record to date regarding Smith's claim and informed Smith (through counsel) by letter that he could review the index and obtain copies of any document in the record. She also informed Smith that he could supplement the record with any additional information within 30 days, or longer if additional time was reasonably needed. The letter informed Smith that the Plan Supervisor had arranged an independent medical examination with Dr. Merritt Foster, and that his case would be reviewed by vocational specialist H. Gray Broughton.

Smith did not object to the selection of Dr. Foster until after Dr. Foster issued his report in September 1995.

Dr. Foster examined Smith on June 27, 1995 and August 2, 1995 for a total of 5 hours. Foster wrote a twenty-three-page report based on personal observation, all medical records, and video tapes of Smith's depositions. The report was forwarded to Smith's counsel on September 5, 1995. It concluded that Smith was not "totally and permanently disabled for any employment," and that his inability to find employment was volitional, not the result of mental illness.

Broughton then reviewed Smith's case and concluded that Smith was "employable" and that Smith had perpetuated his "unemployability" by misrepresenting his work readiness and skills. Broughton's report was sent to Smith's counsel on September 22, 1995 with a letter stating that the record was complete except for additional information Smith might submit by October 9, 1995. Smith did not provide additional information by this date.

The file was then forwarded to Travelers Insurance Company ("Travelers") for review. Smith was informed the record would remain open until October 20, 1995 for any additional information he might provide. On October 20, 1995, Smith's counsel faxed a letter to the Plan Supervisor stating that additional information he intended to send was not yet ready. The additional information arrived on October 24, 1995 and included an October 4, 1995 letter from a vocational expert, Gregory Henderson, responding to Broughton's report, and a September 28, 1995 letter from Dr. Wilson, responding to Dr. Foster's report. Travelers considered all this information and, on November 6, 1995, concluded that Smith was unable to perform his regular job from February 6, 1984 to February 16, 1986 due to a psychological illness. Travelers further concluded

that the record did not support a finding that Smith continued to be disabled under the stricter standard applicable after twenty-four months. Under the standard applicable after twenty-four months, a claimant must be "totally and permanently disabled," or "unable to do any job for which [he] is reasonably qualified by training, education, and experience." Travelers recommended termination of Smith's benefits effective Feb. 16, 1986.

Travelers based the decision on the following undisputed facts:

(1) On December 5, 1992 Smith completed a Personal Profile Evaluation Form, which asked questions about his lifestyle and how his alleged disability affected his ability to work. Smith indicated on the form that he did not participate in any social or community activities, had no hobbies or interests, did not travel, did not do housework, and needed help with personal grooming.

(2) In the fall of 1992, Smith, contrary to his statement concerning travel on the Form, had embarked on a journey of at least twenty-seven days to California, Japan, China, Nepal, and Thailand.

(3) From 1986 to 1993, contrary to his statement concerning community activities on the Form, Smith participated in meetings of the Continuing Education Advisory Board for Longwood College ("Longwood Board"), the Halifax Vocational Foundation ("Halifax Foundation"), and the Private Industrial Council ("Industrial Council"). Smith served as Chairman of the Longwood Board from November 1989 until his resignation on March 24, 1993. For the Halifax Foundation, Smith served on several committees, often giving reports to those committees. He missed only one meeting until his

resignation on May 20, 1993. For the Industrial Council, Smith served as Chairman and would often make motions on a variety of topics. He resigned his position in June 1993.

(4) Affidavits from both Sandra Feagan, Director of the Continuing Education Center at Longwood College from 1985 to 1991 and Turner Carter who served with Smith at the Halifax Foundation state that Smith participated actively and creatively.

(5) In 1993, Champion placed Smith under surveillance. Smith was seen operating a motor vehicle, attending meetings of community organizations, purchasing products, and performing bank transactions, among other things. The investigation also revealed that Smith participated on the South Boston City Council as Vice-Mayor until May 1986. Newspaper articles showed that Smith campaigned for reelection during the Spring of 1986, but lost his bid for reelection.

Travelers noted that Smith's community activities, travel to China, affidavits of Ms. Feagan and Mr. Carter, day to day activities, as well as the findings of Dr. Foster and Mr. Broughton did not support the conclusion of Smith and his psychiatrist, Dr. Wilson, that he was totally disabled.

Smith filed a request for review of the conclusions on January 11, 1996, submitting a medical report from Dr. Patrick Logue, a psychologist, and a second letter from Dr. Wilson, that Smith was not only severely depressed but also potentially had a brain disease that compromised his brain functioning.

On March 29, 1996, the Claims Review Committee affirmed the denial of Smith's benefits, concluding that he had not met the definition of "total disability" in Section 2.l(kk) of the Plan and that Smith misled and made false statements to the Plan Supervisor.

DISCUSSION:

I. Summary Judgment Standard

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial and summary judgment is appropriate. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In considering a motion for summary judgment, "the court is required to view the facts and draw reasonable inferences in a light most favorable to the nonmoving party. The plaintiff is entitled to have the credibility of all his evidence presumed." *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir.) (citations omitted), *cert. denied*, 115 S.Ct. 68 (1994). There is a genuine issue of fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 2, 248 (1986).

I find that there are no genuine issues of material fact, and that Champion is entitled to judgment as a matter of law.

II. Standard of Review

In its May 2, 1995 decision, this court addressed the question of what standard of review applies to the plan administrator's decision. I held that where an employee benefit plan gives discretion to a plan administrator to interpret the language of the plan, as is the case here, an "abuse of discretion" standard is appropriate. *See* May 2, 1995 Memorandum Opinion at 7. I see no reason to disturb this conclusion now. To the contrary, more recent Fourth Circuit authority supports the application of the abuse of discretion standard in the instan

case. In *Haley v. Paul Revere Life Ins. Co.*, 77 F.3d 84 (4th Cir. 1996) the court reiterated the standard of review as follows:

> [I]f the plan administrator's decision falls within the scope of the administrator's contractually conferred discretion, the court may review the merits of an administrator's decision only for an abuse of discretion. The court must not disturb the administrator's decision if it is reasonable, even if the court itself would have reached a different conclusion.

Id. at 89. I previously held that Champion's Plan confers discretion on the administrator to determine the eligibility of employees to receive benefits, *see* May 2, 1995 Memorandum Opinion at 7, and, thus, the only remaining question is whether Champion's decision to deny benefits was reasonable.

In deciding whether the administrator's decision was reasonable, as Smith correctly points out, the court should weigh as a factor any conflict of interest Champion might have in denying benefits. In *Bernstein v. Capitalcare, Inc.*, 70 F.3d 783 (4th Cir. 1995), the court held that a conflict of interest exists where the employer both administers the plan and pays for benefits received by its members. In such circumstances, the *Bernstein* court held that the appropriate standard of review is a "modified abuse of discretion standard," in which the "court should uphold the plan administrator's decision if the decision was reasonable; and the court should weigh the conflict of interest as a factor in analyzing the reasonableness of the decision. *Id.* at 788. If Champion denies health benefits to its members, it generally profits by the amount of expenses avoided, and, thus, operates under a conflict of interest. Accordingly, the *Bernstein* standard applies, and I must consider Champion's financial interest in determining the reasonableness of its decision to deny Smith's benefits. In the May 2, 1996

decision, I concluded that Champion's conflict of interest had no discernable impact on the outcome of its decision to deny Smith's benefits. The evidence submitted by the parties upon remand of Smith's claim for a redetermination of his eligibility for benefits bolsters this conclusion. I now turn to a discussion of the basis for Champion's decision.

III. Reasonableness of the Benefits Denial

Under the terms of the Plan, to receive benefits for the first twenty-four months of a disability, an employee must be unable to do his or her regular job. After the first twenty-four months, however, the employee must be unable "to engage in any occupation or business for wage or profit for which he is or may become reasonably qualified by training, education, or experience." The Plan further provides that if there is a difference of opinion as to whether a participant is totally disabled, the decision of the Plan Supervisor is final and conclusive.

In determining that Smith was no longer eligible to receive benefits Champion points to the following facts that Smith does not dispute.[1] In the fall of 1992, Smith embarked on a month-long journey to the far east. From 1986 to 1993 he participated in a number of community activities, including serving as Chairman of the Longwood College Continuing

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[1] Smith argues that Champion violated 29 C.F.R. § 2560.503.l(h), requiring that the notice of decision on review must include specific reasons for the denial of benefits, by failing to set out the rationale for the decision in its denial opinion. Smith correctly notes that the April 8, 1996 rejection letter does not cite the specific reasons for the denial of benefits. However, the letter specifically adopts the November 6, 1995 decision of Travelers Insurance Company, which sets out in detail the reasons for the denial. This is sufficient to satisfy the requirements of § 2560.503(h).

Education Advisory Board and the Private Industrial Council. Smith also served on several committees of the Halifax Vocational Foundation, and according to the affidavits of Sandra Feagan who worked with Smith at Longwood College and Turner Carter who served with Smith on the Halifax Foundation committees, Smith participated actively and creatively in these activities. Champion placed Smith under surveillance and observed him operating a motor vehicle, attending meetings of the above community organizations, purchasing products, performing bank transactions, having two conversations in which he is at times laughing and animated, and throwing brush and limbs on a bonfire in a field. Champion's investigation also revealed that Smith served on the South Boston City Council as Vice-Mayor until May 1986, and newspaper articles show that Smith campaigned for reelection in the Spring of 1986. During the campaign Smith prepared his own budget figures to protest a tax increase.

When asked about his lifestyle on the December 5, 1992 Personal Profile Evaluation Form, Smith misrepresented his abilities and activities. Contrary to the above listed facts, Smith indicated that he did not participate in any social or community activities, that he did not travel, did no housework, and needed help with personal grooming. It is not clear whether these misrepresentations alone could justify the denial of benefits. It is clear, however, that Champion did not base its decision solely on Smith's misrepresentations. The fact of such misrepresentation suggests an attempt to deceive Champion as to the true extent of his disability or lack thereof, thus supporting the decision to deny benefits.

Also supporting Champion's decision was the medical opinion of Dr. Foster, who examined Smith on June 27, 1995 and August 2, 1995 for a total of five hours. Foster based his report on Smith's medical records, portions of Smith's video-

taped depositions, Dr. Wilson's affidavit, and other relevant documents. He concluded that

> [w]ith the inability to establish the diagnosis of an incapacitating mental illness, and with the overwhelming evidence of Malingering and deceit, it is my opinion within a reasonable degree of medical certainty, the position that Mr. Robert Smith is and has been, totally and permanently disabled, for any employment since February 1986 is untenable. Any inability to be gainfully employed on his part, therefore, is a matter of volition and not the result of an incapacitating emotional or mental illness.

Smith does not dispute that he engaged in the activities listed above, nor does he explain why he answered falsely on the Personal Profile Evaluation Form. Instead, Smith argues in response that (1) the activities he was observed performing fail to show that he was capable of holding a full time job or that he was not depressed; (2) the testimony of other medical experts, including Smith's treating physician, shows that he was severely depressed; and (3) Dr. Foster's report is biased and unreliable. I will address each argument in turn.

First, Smith argues that a depressed person might be able to perform the activities listed above yet still be incapable of holding a regular job and enduring its concomitant stresses. Whether Smith could do all he was observed doing and still be depressed to the degree of "total disability" is not for this Court to decide. Rather, the issue is whether Champion's decision was reasonable. The fact that Smith could perform such a wide variety of tasks, coupled with his fraudulent responses on the Personal Profile Evaluation, supports a finding that Champion's decision was reasonable.

Second, Smith argues that the opinions of several physicians who examined him support the conclusion that he was severely depressed. Dr. Patrick Logue examined Smith on November 21, 1995. Dr. Logue had previously evaluated Smith in January 1983. In the course of the examination, Dr. Logue subjected Smith to a number of psychometric tests, and concluded that Smith "is by observation, by history, and by testing depressed... [and] totally disabled for work of any nature." Smith also cites the reports of Dr. William Floyd, Dr. Marvin Rozear, the Charter Hospital of Greensboro, and Aaron Stewart, M.A., which concluded Smith was depressed. Moreover, Dr. William Wilson, Smith's treating physician, concluded in a February 8, 1995 letter:

> It is my opinion that [Smith] is and has been permanently and currently is totally disabled...His profound anergia and his response to frustration, make it unlikely that he can do any work which requires concentration and an expenditure of mental effort...The only activities in which he indulged were those associated with his job as Mayor and City Councilman of South Boston. This job lasted for only a short while after he became disabled. He was not reelected to this post. This was the only outside activity in which he indulged after his disability began.

Smith does not, however, address Champion's argument that Smith may have attempted to deceive his doctors in order that they render a diagnosis in support of his disability claim. In a November 24, 1993 letter to Dr. Wilson, Dr. Rozear stated that Smith's "mental status exam suffered from profound lack of effort, which ranged from simple apathy to evasiveness, to playing games, and even to hostility...In my experience, when a patient suffers from this degree of lack of effort, the psychometric testing is useless." Dr. Rozear noted in his

medical report for that day that "[a]t times the patient was evasive and at times it was obvious that he was playing games. There were long pauses before both simple and complex tasks. He did not seem to be sincere in his effort at all." Aaron Stewart, in his August 3, 1993 report noted similar behavior: "In regard to [Smith's] MMPI profile there is a possibility that he has produced an invalid profile. He responded to later items in a random fashion, thereby making the report possibly show an exaggerated picture of the present situation and the problems the client is experiencing." Finally, Smith concealed from Dr. Wilson his journey to southeast Asia, which was revealed only after the January 20, 1995 hearing before this court. As the foregoing demonstrates, there was ample evidence in the record to support Champion's decision to favor Dr. Foster's opinion over other medical testimony.

Finally, Smith attempts to discredit Dr. Foster's findings with the assertion that because Champion paid Foster, the conclusions of Foster's report are suspect, and because Foster did not perform psychometric testing on Smith, his conclusions are unreliable. First, any bias on the part of Dr. Foster is unsubstantiated. Second, Smith fails to establish that Foster's methodology was flawed or that psychometric testing guarantees more reliable results. Indeed, the Lipsitz and Williams article Smith attached in support of the superiority of psychometric testing states that "[a]lthough some have argued eloquently for the adoption of standardized assessment instruments by clinicians, the informal psychiatric interview remains the primary source of clinical assessment."

CONCLUSION

As the foregoing discussion demonstrates, Champion's decision to deny Smith's disability claim was amply supported

by the record. Accordingly, summary judgment in favor of Champion is GRANTED.

An appropriate order shall issue.

/s/ Jackson L. Kiser
Chief United States District Judge

APPENDIX B

[Filed November 4, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

Civil Action No. 94-0069-D

ROBERT W. SMITH,
Plaintiff,

v.

CHAMPION INTERNATIONAL CORPORATION,
Defendant.

ORDER

In accordance with the written Memorandum Opinion entered this day, it is hereby ADJUDGED AND ORDERED that defendant's motion for summary judgment is GRANTED and that this action is stricken from the active docket of this court.

The Clerk is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

ENTERED this 4th day of November, 1996.

/s/ Jackson L. Kiser
Chief United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2740

RACHEL T. SMITH, AS
EXECUTRIX FOR THE ESTATE
OF ROBERT W. SMITH,
Plaintiffs-Appellants,

v.

CHAMPION INTERNATIONAL CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Virginia, at Danville
Jackson L. Kiser, Senior District Judge
(CA-94-69-D)

Argued: August 12, 1997
Decided: September 25, 1997

Before RUSSELL and HALL, Circuit Judges, and
MICHAEL, Senior United States District Judge for
the Western District of Virginia, sitting by designation

Reversed and remanded by unpublished per curiam opinion

OPINION

PER CURIAM:

In February 1984, Champion International Corporation ("Champion") placed employee Robert W. Smith on long-term disability because he suffered from chronic depression. Ten years later, in July 1994, Champion discontinued Smith's disability benefits after it determined that Smith was no longer "totally disabled" as required by Champion's Long Term Disability Plan (the "Plan").[1]

In August 1994, Smith brought suit in district court for restoration of his disability benefits, claiming that Champion unlawfully terminated his benefits in violation of the Employment Retirement Income Security Act[2] ("ERISA"). Nine months later, the district court remanded Smith's case to the Plan Supervisor for a redetermination of eligibility because Champion had violated ERISA procedurally and substantively when denying Smith's claim. Champion's ERISA violations included *inter alia* its failure to notify Smith of the specific reasons for its termination of benefits; its failure to inform Smith it relied upon surveillance evidence when making its decision; and its failure to obtain an expert opinion disputing the conclusions of Smith's treating physicians that Smith suffered from chronic depression.

Upon remand, Champion hired psychiatrist Merritt Foster to independently examine Smith. It also hired vocational specialist H. Gray Broughton to review Smith's case. Their conclusions favored the denial of benefits.

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[1] To be more precise, Smith received disability benefits under Champion's Long Term Disability Plan for Salaried Employees of Champion International Corporation #506.

[2] 29 U.S.C. § 1001 *et seq.*

Dr. Foster examined Smith on June 27 and August 25, 1995, for a total of five hours. Dr. Foster's twenty-three page report concluded that Smith was a malingerer and that he has not been "totally and permanently disabled for employment since February 1986." In addition, Dr. Foster believed that Smith's inability to be gainfully employed was volitional and "not the result of an incapacitating emotional or mental state." Mr. Broughton then reviewed Smith's case. Although Mr. Broughton neither personally examined nor interviewed Smith, he concluded that Smith was employable since 1986.

The Plan Administrator then forwarded Smith's file to Travelers Insurance Company ("Travelers"), which was now handling some of Champion's administrative duties. In addition to the reports of Dr. Foster and Mr. Broughton, Travelers primarily relied on the following information when recommending the termination of Smith's benefits: (1) that Smith indicated on a 1992 Personal Profile Evaluation ("PPE") that he did not participate in any social or community activities, despite the fact that he had attended meetings of three local boards from 1986 to 1993 and served as Chairman on two of the boards; (2) that on the same PPE, Smith stated that he did not travel, despite the fact that he had traveled to California and Asia with family members three months prior to completing the PPE; (3) that Champion had videotaped Smith driving a car, attending council meetings, and performing bank transactions; (4) that Smith had been Vice-Mayor of the South Boston City Council until May 1986; (5) that Smith did not require continued hospitalization; and (6) that Smith saw his treating physician only twice a year.

Smith requested that Champion's Employee Benefits Committee (the "Committee") review Travelers' recommendation. The Committee heard Smith's appeal and affirmed the denial of his benefits. After the conclusion of the

administrative appeal process, Champion filed a motion for summary judgment in federal court. The district court granted summary judgment in favor of Champion on the basis that Champion's denial of benefits was reasonable and dismissed Smith's claim for restoration of benefits.

Smith appealed the district court's decision. He asserted that the district court committed several procedural errors and applied the wrong standard of review to the Plan Supervisor's decision to deny benefits. Twenty days following the district court's entry of judgment, but before this court heard his appeal, Smith committed suicide. Rachel Smith, executrix of Smith's estate, maintains his appeal. We review *de novo* a district court's grant of summary judgment.[3]

I.

Smith contends that the district court applied the wrong standard of review when examining the Plan Supervisor's decision to deny benefits. Smith asserts that the district court should not have reviewed the decision for abuse of discretion because the Plan Supervisor had a conflict of interest in the claims review process. When determining which standard of review to apply, the district court must first turn to the language of the plan.[4] If the plan states that the administrator is empowered to construe uncertain terms or that the administrator's eligibility determinations are to be given deference, then the abuse of discretion standard is appropriate.[5]

The abuse of discretion standard is inappropriate, however, when a fiduciary or an administrator is operating under a conflict of interest. When a conflict of interest exists, the district court must weigh the conflict "as a factor in finding

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[3] *Nguyen v. CNA Corp.*, 44 F.3d 234, 236 (4th Cir. 1995).

[4] *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

[5] *Id.* at 111-112.

whether the fiduciary or plan administrator abused its discretion."[6] Accordingly, we held in *Doe v. Group Hospitalization & Medical Services*[7] that, in cases involving a conflict of interest, the district court should review the fiduciary's decision with some deference, but it must reduce its deference "to the degree necessary to neutralize any untoward influence resulting from the conflict."[8] This standard of review is the "modified abuse of discretion standard."[9]

In the instant case, the Plan is a self-funded disability plan whose benefits are paid from Champion's general assets. The Plan confers the Plan Supervisor with the discretion to determine an employee's eligibility to receive benefits and to determine the amount and kind of benefits payable to the employee. Additionally, in the event there exists a difference of opinion as to whether an employee qualifies as having a "total disability," the Plan Supervisor's decision is final. Thus, Champion argues that the traditional abuse of discretion standard was appropriate.

Three factors, however, weigh heavily in our finding a conflict of interest, which subsequently necessitate changing the review standard. One, Champion directly appoints and compensates the members of its Committee and the Plan Supervisor, and each appointee is a Champion employee. Two, Champion administers the plan itself; it does not pay a premium to any insurer to fund benefits paid out to the plan beneficiaries. Third, the plan is not fully funded. Thus, any denial of benefits is a savings, which accrues to the direct benefit of Champion and other plan participants. Contrary to the district court's finding, therefore, the Plan Supervisor and the Committee

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[6] *Id.* at 115 (internal quotations omitted).

[7] 3 F.3d 80, 87 (4th Cir. 1993).

[8] *Id.*

[9] *Bernstein v. CapitalCare, Inc.*, 70 F.3d 783 (4th Cir. 1995).

unquestionably labored under a conflict of interest arising from their dual roles as plan administrators and employees of Champion. Accordingly, the district court should have reviewed the Plan Administrator's denial of benefits under the modified abuse of discretion standard.

Using the traditional abuse of discretion standard, the district court determined that the Plan Supervisor's decision was reasonable and supported by the record. In arriving at this conclusion, the district court was persuaded by the information relied upon by Travelers, *e.g.* the reports of Dr. Foster and Broughton, Smith's misrepresentations on the PPE, and that Smith had traveled and served on community boards. But under the modified abuse of discretion standard, this evidence fails to sufficiently controvert the twelve years of medical observation, testing, and treatment administered by Smith's treating physicians, who repeatedly concluded that Smith suffered from severe and chronic depression from 1984 until his suicide in November 1996.

Evidence before the Plan Supervisor substantiating Smith's total disability included reports from physicians Wilson, Floyd and Rozear, and psychologist Stewart. Dr. Wilson regularly treated Smith from 1983 until 1996 and submitted reports to Champion twice a year. He consistently diagnosed Smith as totally disabled due to chronic depression. His treatment over the years included: hospitalizing Smith on several occasions for suicidal ideations; administering prescriptive anti-depressants and electric convulsive treatments; and subjecting Smith to psycho and cognitive therapy. In response to Traveler's conclusion that Smith was not under the "regular care" of a physician, Dr. Wilson stressed that after eight years of treatment, he only saw Smith every three to six months because social security considers this adequate follow-up for chronically depressed patients. Additionally, in response

to Traveler's conclusion that Smith could not have suffered from depression since 1986 because Smith participated on community boards and was able to perform minimal daily activities, Dr. Wilson stated that as part of Smith's rehabilitative therapy he encouraged Smith to get out and interact with individuals outside of his immediate family. Dr. Floyd treated Smith in 1989 at Duke University Medical Center, and he concluded that Smith suffered from hypertension, hypertensive heart disease, and chronic depression. Dr. Rozear, a neurologist also at Duke, tested Smith on two occasions to determine whether or not Smith's memory loss and decline in mental ability was neurologically based. His evaluations concluded that Smith suffered from severe depression and psychotic thinking. Finally, Dr. Wilson hospitalized Smith at Charter Hospital in 1993 for suicidal ideations and severe depression. While at Charter, Mr. Stewart subjected Smith to a battery of psychological tests, which led Stewart to conclude that Smith suffered from a major affective depressive disorder and that Smith possessed few intellectual and emotional resources which enabled him to manage daily stress.

II.

Given the evident conflict of interest and the overwhelming objective evidence substantiating Smith's total disability since 1986, we hold that the district court erred in awarding summary judgment to Champion. Hence, in the interest of justice, we reverse the lower court's decision and remand the case to the district court to reinstate Smith's disability benefits in accordance with this opinion.

REVERSED AND REMANDED

APPENDIX D

[Filed October 24, 1997]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2740
(CA-94-69-D)

RACHEL T. SMITH, AS
EXECUTRIX FOR THE ESTATE
OF ROBERT W. SMITH,
Plaintiffs-Appellants,

v.

CHAMPION INTERNATIONAL CORPORATION,
Defendant-Appellee.

Filed October 24, 1997

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court along with a motion to file transcript of oral argument as an attachment to the petition for rehearing and suggestion for rehearing in banc. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and the motion to include transcript as an attachment and is of the opinion that the motion to include transcript should be granted and the petition for rehearing should be denied.

IT IS ORDERED that the motion to include transcript as an attachment is granted and the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX E

STATUTORY PROVISIONS

29 U.S.C. § 1102(a)(1) (ERISA § 402(a)(1)):

Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

* * *

29 U.S.C. § 1104(a) (ERISA § 404(a)):

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

* * *

29 U.S.C. § 1106 (ERISA § 406):

Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect-

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between

the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not-

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest

A transfer of real or personal property by a party in interest

to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

* * *

29 U.S.C. § 1108(c) (ERISA § 408(c)):

(c) Fiduciary benefits and compensation not prohibited by section 1106

Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from -

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

Supreme Court, U.S.
FILED
FEB 3 1998
CLERK

No. 97-1023

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

CHAMPION INTERNATIONAL CORPORATION,

Petitioner,

v.

RACHEL T. SMITH, as EXECUTRIX
FOR THE ESTATE OF ROBERT W. SMITH,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION

John B. Mann, Counsel of Record
LEVIT & MANN
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Suite 100
Richmond, Virginia 23230
(804) 355-7766
Counsel for Respondent

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth Circuit Court of Appeals correctly reviewed the Respondent's claim for disability benefits due to the undisputed conflict of interest on the part of Champion International Corporation.

PARTIES TO THE PROCEEDINGS BELOW AND DISCLOSURE UNDER SUP. CT.R. 29.6

Rachel T. Smith, Respondent is the wife and executrix of the Estate of Robert W. Smith, who died of a self-inflicted gun wound in November 24, 1996. Robert W. Smith was the plaintiff in the district court.

Champion International Corporation, Petitioner, was the defendant in the district court. Champion International Corporation has no parent company and no subsidiaries which are less than wholly owned.

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No. 97-1023

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

CHAMPION INTERNATIONAL CORPORATION,

Petitioner,

v.

RACHEL T. SMITH, as EXECUTRIX
FOR THE ESTATE OF ROBERT W. SMITH,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF FACTS

Robert W. Smith ("Smith") had been employed by Champion International Corporation ("Champion") in South Boston, Virginia since 1966. Smith became ill and was initially hospitalized at Duke University Medical Center in December, 1982. Smith's discharge diagnosis was "major affective disorder, depressed type, major depressive episode." Thereafter, William P. Wilson, M.D., a board certified psychiatrist at Duke University Medical Center, recommended that Smith be placed on disability, and he was

placed on disability by Champion on February 16, 1984. Smith was granted Social Security disability benefits in 1984 and received Social Security benefits until his suicide in November, 1996. Smith remained under the care and treatment of William P. Wilson, M.D., from 1983 until his suicide in November, 1996. In order for Smith to qualify for disability benefits, Smith was only required to demonstrate that he was not able to engage in any occupation or business for wage or profit for which he is or may become reasonably qualified by training, education or experience. Dr. Wilson consistently was of the medical belief that Smith met this criteria for disability benefits and remained permanently and totally disabled until his suicide.

In fact, all of Smith's treating physicians supported Smith's diagnosis of disability due to chronic major depression, which is in direct contrast to the opinion issued by Merritt W. Foster, M.D., a psychiatrist hired by Champion to examine Smith.

Dr. Wilson stated in a June 22, 1993 letter to Champion, "As far as I am concerned, Mr. Smith is permanently and totally disabled. His progress is poor and I have not felt that more aggressive therapy is indicated in light of his eleven year history of depression. Dr. Wilson further stated in a June 14, 1993 letter to Champion, "I would like to reiterate that Mr. Smith is permanently and totally disabled. Smith has continued to be despondent, compulsive and unable to concentrate. He cannot complete tasks, and become agitated with the slightest stress or change. He loses control when angered and verbally abuses his wife." In a February 8, 1995 letter to Champion, Dr. Wilson stated, "It is my opinion that the above named patient is and has been permanently and currently is totally disabled. His prognosis

is extremely poor in the light of the worsening of symptoms over the last twelve years. He is incapable of returning to any work compatible with his intellectual and educational credentials."

Smith was seen by Marvin P. Rozear, M.D., a neurologist at Duke University Medical Center on November 24 and December 8, 1993 for an evaluation to determine a possible neurological cause for Smith's memory loss and decline in mental ability due to his depression. Dr. Rozear stated in his report, "I think that his symptoms are coming from depression, and I think this is obviously an extremely complex situation. I think the patient is severely depressed and is having problems with his memory related to difficulty in concentrating and focusing.

On June 20, 1989, William L. Floyd, M.D. of Duke University Hospital, determined that Smith was suffering from hypertension, hypertensive heart disease and chronic depression.

In July, 1993, Smith was hospitalized at Charter Hospital in Greensboro, North Carolina due to suicidal thoughts and severe depression. The psychological testing by Aaron H. Stewart, M.A., confirmed that Smith's symptoms indicated a major affective depressive disorder and that he had limited intellectual and emotional resources to manage daily stress. Dr. Stewart noted in his report, "His scores represent a person who is characterized by depression, social introversion, persecutory themes, and mental confusion.

Patrick Logue, M.D., of Duke University Medical Center examined Smith on November 21, 1995 and administered a number of psychological tests. Dr. Logue's

conclusions based upon the test results were as follows: "He is by observation, by history, and by testing depressed and has apparently remained depressed. The current evaluation shows a 30 point drop in IQ, significant problems with attention, memory, frontal executive functions, and speed of processing. However, at this time, I would concur that the patient is totally disabled for work of any nature. He has been given most of the treatments that can be given for depression, but has not responded. He is by history, by testing, and by observation still severely depressed."

In January, 1995, Vocational and Medical Consultants, Inc. conducted a lengthy interview and vocational evaluation of Smith. Its report dated February 20, 1995 stated that Smith was not employable at the present time and had not been employable for a number of years due to his medical condition.

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

In its Petition for Writ of Certiorari, Champion erroneously asserts that the decision in Smith somehow conflicts with certain other circuit court of appeals decisions regarding the appropriate standard of review to be applied in cases where the Plan is self-funded and controlled by the Employer who also serves as the Plan Administrator..

Champion claims that the Fourth Circuit's decision by a unanimous panel composed of Judges Russell, Hall, and Michael, failed to focus solely on the evidence Champion produced which claims to support the decision to deny Smith his disability benefits until his untimely death due to suicide. The Fourth Circuit in its unpublished opinion, did not state

that it was reviewing Smith's benefit claim under a de novo standard, but only ruled that it was reviewing Champion's denial under a "modified" abuse of discretion standard which considered Champion's conflict of interest. The Fourth Circuit was convinced that the evidence adduced by Champion failed to "sufficiently controvert the twelve years of medical observation, testing and treatment administered by Smith's treating physicians, who repeatedly concluded that Smith suffered from severe and chronic depression from 1984 and until his suicide in November 1996." (Petitioner's App. 20a).

In its decision, the Appeals Court fairly reviewed all the medical evidence both favorable and unfavorable to Smith and correctly gave appropriate weight to the overwhelming medical evidence from Smith's treating physicians that supported Smith's disability due to his chronic depression and psychotic thinking. Furthermore, much of the evidence adduced by Champion to support its denial was obtained by Champion only after the District Court ruled that Champion had been engaging in substantial procedural abuses in its claim procedure and did not afford Smith proper statutory due process in its claim denial process.

The Appeals Court found that the medical evidence substantiating Smith's disability was "overwhelming." This holding certainly confirms that the Appeals Court would have found the medical evidence supporting Smith's disability to be "overwhelming" under any standard of review when compared to Champion's anecdotal proof that Smith served on several community boards and had gone on a trip to China with his wife and daughter.

The Fourth Circuit observed that Dr. Wilson, Smith's long-time psychiatrist, had explained that Smith's community and travel activities were simply part of his rehabilitative therapy for any individual suffering from chronic major depression. The diagnosis of Smith's treating physicians that Smith suffered from chronic major depression was fully supported by the neurological testing conducted by Dr. Rozear who subjected Smith to a battery of neurological and psychological testing which confirmed their diagnosis of chronic major depression.

Champion has omitted from its Statement of Facts that the District Court, in its Order dated May 2, 1995, found Champion to have engaged in purposeful violations of ERISA's procedural requirements in failing to provide Smith with a full and fair review of his claim denied and engaged in deceit in failing to advise Smith of the true reasons for the denial of his disability claim.

SUMMARY OF THE ARGUMENT

The medical evidence presented to Champion on behalf of Smith was overwhelming and more than substantiated and validated Smith's disability claim. Smith was clearly eligible for disability benefits afforded under the Long-Term Disability Plan. The Fourth Circuit applied an appropriate standard of review in determining Smith's benefit eligibility.

ARGUMENT

In order for Smith to qualify for disability benefits under the terms of the Champion Long-Term Disability Plan (the "Plan"), Smith was required to demonstrate that he met

the definition of "Total Disability" which is defined under the Plan as "the inability to engage in any occupation or business for wage or profit for which he is or may become reasonably qualified by training, education, or experience." According to the medical records and objective testing submitted to Champion on behalf of Smith by his health care providers, Smith clearly met this criteria under the terms of the Plan.

Champion claims that the Fourth Circuit, by adopting an improper standard of review, failed to focus solely on the sufficiency of the evidence Champion provided to its own employees who were responsible for not only administering the Plan, but also was determining benefit eligibility and appeals of benefit denials. The Fourth Circuit, in its well-reasoned opinion, did not state that it was reviewing Smith's disability claim under a de novo standard, but only held that it was reviewing Champion's decision to deny Smith's disability claim under a modified abuse of discretion standard due to a conflict of interest in the administration of the Plan by Champion and its employees and the payment of benefits from Champion's corporate coffers. The Fourth Circuit was convinced that the evidence adduced by Champion failed to "sufficiently controvert the twelve years of medical observation, testing and treatment administered by Smith's treating physicians, who repeatedly included that Smith suffered from severe and chronic depression from 1984 until his suicide in November 1996. The medical records supporting Smith's disability claim are voluminous and are contained in the Appendix filed with the Fourth Circuit.

The United States District Court's opinion (Petioner's App. 6a) acknowledged that the Fourth Circuit has recognized that conflict of interest exists where the employer is both administrator of the plan and pays for benefits

received by its beneficiaries under the employer's pension and welfare benefit plan. This holding was in accordance with a long line of Fourth Circuit holdings that recognize that a conflict of interest may exist where the employer is both the administrator of the benefit plan and is responsible for reviewing benefit claims made by plan participants:.

> In Bernstein v. CapitalCare, Inc., 70 F.3d 783 (4th Cir. 1995), the court held that a conflict of interest exists where the employer both administers the plan and pays for benefits received by its members. In such circumstances, the Bernstein court held that the appropriate standard of review is a "modified abuse of discretion standard," in which the "court should uphold the plan administrator's decision if the decision was reasonable; and the court should weigh the conflict of interest as a factor in analyzing the reasonableness of the decision. Id. at 788. If Champion denies health benefits to its members, it generally profits by the amount of expenses avoided, and, thus, operates under a conflict of interest. Accordingly, the Bernstein standard applies, and I must consider Champion's financial interest in determining the reasonableness of its decision to deny Smith's benefits. (Petitioner's App. 7a) .

The District Court also acknowledged that the appropriate standard of review is the "modified abuse of discretion" standard which was also adopted by the Fourth Circuit in its decision. Now Champion argues that even the

District Court was in error when it reviewed the administrative record under this "modified abuse of discretion" standard and should have applied a strict "abuse of discretion" standard of review.

The Fourth Circuit fairly reviewed all the medical evidence, both favorable and unfavorable, to Smith and correctly gave appropriate weight to the overwhelming medical evidence from Smith's treating physicians and health care providers that supported Smith's disability due to his mental illness, i.e., major chronic depression and psychotic thinking. Furthermore, much of the evidence adduced by Champion to support its claim was obtained by Champion only after the District Court ruled that Champion had been engaging in substantial procedural abuses in its claim procedure and did not afford Smith proper process in its claim denial process and remanded Smith's claim back to the Plan Administrator for further consideration.

In its unpublished opinion, the Appeals Court found that the medical evidence substantiating Smith's disability was "overwhelming." This holding clearly indicates that the Appeals Court would have found the medical evidence supporting Smith's disability to be "overwhelming" under any standard of review when compared to Champion's anecdotal proof that Smith served on several community boards and had gone on a trip to China with his wife and daughter. The Appellate Court reasoned that Smith's long-time psychiatrist had explained that Smith's community and travel activities were simply part of his rehabilitation therapy and that was appropriate for any individual suffering from chronic major depression. The diagnosis of Smith's treating physicians that Smith suffered from chronic major depression was fully supported by the neurological testing conducted by

Dr. Rozear who subjected Smith to a battery of neurological and psychological testing which confirmed the diagnosis of chronic major depression. Champion's medical "expert" only saw Smith on two (2) occasions after he was hired by Champion to write a medical report favorable to Champion during the course of this contested litigation.

This Court in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed. 2d 80 (1989), held that a Court is required to determine the effect of any conflict of interest on the judicial standard of review "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighted as a factor in determining whether there is an abuse of discretion." Bruch, supra, 489 U.S. at 115, 109 S.Ct. at 957.

In response to this mandate, the Fourth Circuit in Doe v. Group Hospitalization & Medical Services, 3 F.3d 80 (4th Cir. 1993), held that where the decision of a fiduciary to deny a claim will further the financial interest of the employer of the plan sponsor, that fiduciary is clearly operating under a conflict of interest which precludes differential review.

The Fourth Circuit has consistently held that a modified abuse of discretion standard is appropriate where the employer or insurance company both administer the Plan and stands to benefit from a denial of a benefit claim. In Bedrick v. Travelers Ins. Co., 93 F.2d 149 (4th Cir. 1996), the Court clearly mandated that the District Court review the actions of a fiduciary who has a conflict of interest as if the conflict of interest did not in fact exist:

> A fiduciary with a conflict of interest must act as if he is "free" of such a conflict. Doe, 3 F.3d at 87. "Free" is an absolute. There is no balancing of interest; ERISA commands undivided loyalty to the plan participants.

In Bernstein v. CapitalCare, Inc., 70 F.2d 783 (4th Cir. 1995), the Fourth Circuit ruled that a clear conflict of interest exists where an employer both administers the Plan and also profits from a denial of benefits.

In Bailey v. Blue Cross & Blue Shield of Virginia, 67 F.3d 53 (4th Cir. 1995), cert denied 116 S.Ct. 1043 (1996), the Fourth Circuit found that the conflict of interest was substantial where the fiduciary, like Champion, was the sole beneficiary of the savings based upon the denial of benefits:

> A more thorough exploration might have been necessary had the conflict of interest not been as total as that in this case where Blue Cross stood as the single beneficiary of a substantial sum based on its denial of benefits.

It is significant that this Court had the opportunity to review the conflict of interest issue in the Bailey case in 1996, but refused to grant review.

During the appeal, Champion only argued before the Fourth Circuit that since there was no conflict of interest that a strict abuse of discretion standard must apply. Champion never urged the District Court to adopt any modified standard of review of its decision to deny disability benefits to Smith. However, Champion now argues that the modified abuse of discretion standard adopted by the Fourth Circuit somehow is

tantamount to de novo review. This Court in Bruch, supra recognized that if the plan fiduciary is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion. It is only common sense for the court to recognize that it must scrutinize the composition of the plan decision makers where the owners of the company retain their own employees to administer their own welfare plans.

The evidence in this particular case overwhelmingly supported Smith's claim for disability from the time his disability benefits were suspended by Champion in July, 1993 until his untimely suicide in November 1996. The Fourth Circuit's rationale in deciding this case simply took into consideration pro and con evidence of disability and its findings that the evidence of disability was overwhelming is supported by the record

CONCLUSION

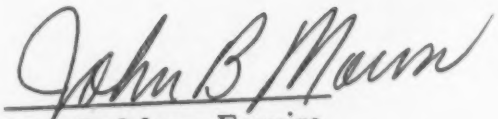
This Court has no reason to grant this writ because the question of a conflict of interest does not impact on the results in this case due to the "overwhelming" medical evidence supporting Smith's diagnosis of chronic major depression which prohibited Smith from being employed and rendered him disabled. The Fourth Circuit properly reviewed the evidence both favorable and unfavorable to Smith's case and determined that the evidence supporting Smith's disability was overwhelming. The Fourth Circuit issued an unpublished opinion which has limited precedential value in this Circuit. When the entire Court reviewed the panel decision upon Champion's Petition for Rehearing and Suggestion for Rehearing En Banc, it also found no reason to alter or change the panel decision.

WHEREFORE, based on the foregoing, I respectfully move this honorable Court to deny Champion's Petition for Writ of Certiorari and uphold the opinion issued by the Fourth Circuit Court of Appeals.

Respectfully submitted,

RACHEL T. SMITH, as
EXECUTRIX FOR THE
ESTATE OF ROBERT W. SMITH

By Counsel



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